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June 29, 2010

BY HAND

Jeff S. Jordan, Esq., Supervisory Attorney
Complaints Examination & Legal Administration
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: **MUR 6304**

Dear Mr. Jordan:

This letter responds on behalf of Station KQTH(FM) and Citadel Broadcasting Corporation ("Citadel"), with the assistance of Mark Levin, to the three letters you addressed to these parties, each dated June 9, 2010, concerning the above-referenced matter under review, MUR 6304. These letters were received by each party on June 14, 2010, which makes this response timely under the FEC's rules. See 11 C.F.R. § 111.6(a). The letters each invite the named parties to "demonstrate in writing that no action should be taken ... in this matter." As demonstrated herein, no action is warranted in this instance because the programming at issue falls squarely within the "media exemption" of the Federal Election Campaign Act of 1971, as amended ("FECA" or the "Act").

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Background Information on KQTH(FM), Mark Levin and "The Mark Levin Show"

Station KQTH(FM) (the "Station") is a broadcast radio station licensed to serve Tucson, Arizona. Journal Broadcast Corporation ("Journal") is the licensee of the Station, which has been on the air since 1994. Journal is ultimately controlled by Journal Communications, Inc., a publicly-traded company (NYSE Stock Symbol: JRN). Journal and its operating affiliates own twelve full-power television stations and 33 radio stations in large and mid-sized markets across the United States.

Since April of 2007, the Station has offered news, talk and opinion programming, using the on-air brand "The Truth." The program schedule is geared toward the Station's conservative listening audience, and includes both locally-hosted live programming and syndicated programs featuring well-known national commentators, including Mr. Levin, Laura Ingraham and Michael Savage. See KQTH(FM) Website (www.1041thetruth.com).

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Mr. Levin is a prominent conservative commentator and constitutional lawyer, in addition to being a well-known author and frequent guest on various radio and television programs; he has hosted "The Mark Levin Show" (the "Show") since 2003. Mr. Levin is an employee of Radio Networks, LLC, a subsidiary of Citadel, and produces the Show from the studios of Citadel's WABC(AM) in New York City. WABC is one of 143 radio stations (66 AM and 177 FM) owned and operated by Citadel and its subsidiaries in media markets throughout the country. Radio Networks, LLC is part of Citadel Media, which has affiliation agreements with more than 4,200 radio stations, reaching more than 106 million teen and adult listeners each week with a wide variety of Citadel-produced programming, including the Show, as well as ABC News Radio, The Huckabee Report, Invas in the Morning, and Rick Dees Weekly Top 60.

The Show is a regularly scheduled news, talk, commentary and call-in program that airs five days a week, Monday through Friday. In New York, it airs from 6 p.m. to 9 p.m. (Eastern Time). The Station carries it on a tape-delayed basis from 7 p.m. to 10 p.m. Arizona Time pursuant to a syndication agreement between Journal and Radio Networks, LLC. The Station receives a feed of the Show and does not alter the content except to insert advertisements at times directed by Radio Networks, LLC in accordance with the syndication agreement. The Show is a news-driven discussion of politics, law, social issues, culture and history where the emphasis is typically on matters that are topical and controversial. Mr. Levin's views and commentaries are supplemented with on-air exchanges with callers and occasional interviews with prominent politicians, government officials, pundits, sports figures and entertainers.

The Show also has a companion website - www.marklevinshow.com - that includes, among other elements, complete audio from past programs, hyperlinks related to recent segments of the Show, biographical information about Mr. Levin, continuing topical features, and links promoting Mr. Levin's favorite causes, recent books and other publications. Links on the home page may include video, news stories, commentary from other websites, blog posts, legal filings, and occasional links to the websites of political candidates whom Mr. Levin has endorsed. These links typically appear for a brief period of time before being replaced by new ones relating to more recent segments of the Show.

The Complaint

The undated complaint (the "Complaint"), which is annexed to each of the letters identified above, states simply that during the January 14, 2010 broadcast of the "Show," Levin "ask[ed] listeners to donate to Scott Brown's campaign for U.S. Senate in Massachusetts." The Complaint further provides the complainant's brief transcription of these remarks, a now expired link to the program audio on the Show website, and a screen capture of the Show website homepage which the complainant states was "made on 1/16/2010," two days after the broadcast. The screen capture shows a link to the "Scott Brown for U.S. Senate" campaign website. The complaint does not allege any specific violation of FECA, nor do the facts stated in the Complaint provide any basis for a finding that such a violation occurred, as further demonstrated below.

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KQTH's Broadcast of "The Mark Levin Show" Is Exempt from Reporting Requirements Pursuant to the "Media Exemption"

The Commission's rules generally provide that contributions to and expenditures on behalf of campaigns, candidates or political committees must be disclosed. *See, e.g.*, 2 U.S.C. § 434. However, consistent with the First Amendment, the Act broadly excludes from this requirement expenditures on "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. § 431(9)(E) (emphasis added). As stated in the House Report concerning the 1974 amendments to the Act, this provision, known as the "press exemption" or "media exemption" was the manifestation of Congress's intent that the Act not "limit or burden in any way the first amendment freedoms of the press" and would assure "the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns." H.R. Rep. No. 93-1239, 93d Congress, 2d Sess. at 4 (1974).

The Station is a broadcast media outlet that is subject to the media exemption. As stated above, the Station is licensed to and operated by Journal, which is not owned or controlled by any political party, political committee, or candidate. *See* Journal's FCC Ownership Report, FCC File No. BGA-20091223ADD (filed Dec. 23, 2009). And the portion of the January 14, 2010 broadcast of the Show that is the subject of the complaint was protected "commentary" disseminated using the Station's broadcast facilities. The attached complete transcript of the segment upon which the Complaint focuses makes plain that the reference to the Scott Brown campaign, its website, and the suggestion that listeners consider a donation was part of a more lengthy commentary on the state of that race, recent polling showing a close contest, and the activities of the candidates and political parties. *See* Attachment.

With respect to the scope of the exemption, the Commission has made plain "that an entity otherwise eligible for the press exemption would not lose its eligibility merely because of a lack of objectivity in a news story, commentary, or editorial, even if the news story, commentary, or editorial expressly advocates the election or defeat of a clearly identified candidate for Federal office." FEC Advisory Opinion 2005-16 (Fired Up!) (citing First General Counsel's Report, MUR 5440 (CBS Broadcasting, Inc.)). For example, the exemption has been broadly construed to apply to each of the following: (1) Garry Trudeau's "Doonesbury" cartoon strip, which printed Presidential candidate Jerry Brown's 1-800 campaign phone number on several occasions during the 1992 Presidential primary season (*see* First General Counsel's Report, MUR 3500 (Universal Press Syndicate, *et al.*)); (2) segments of a news/talk program where the hosts organized and broadcast several political rallies, which included candidate participation, in opposition to the reelection of several Members of Congress (*see* First General Counsel's Report, MUR 5569 ("The John and Ken Show")); (3) operation by a for-profit corporation of an "Internet TV station" covering and promoting Democratic candidates for federal office (*see* FEC Advisory Opinion 2008-14 (Melothé, Inc.)); and (4) the serial

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distribution via broadcast stations of documentary films with partisan political points of view (see FEC Advisory Opinion 2010-08 (Citizens United)).

The only other issue that the Commission has evaluated in affirming the applicability of the media exemption is whether the activities that are subject of a complaint serve "a legitimate press function." See *FEC v. Phillips Publishing*, 517 F. Supp. 1308, 1312 (D.D.C. 1981); *Readers Digest Assn. v. FEC*, 309 F. Supp. 1210, 1214 (S.D.N.Y. 1981). The Commission has examined two considerations in determining whether an entity is engaging in a legitimate press function: (1) whether the entity's "materials" are available to the general public, and (2) whether they are comparable in form to those ordinarily "issued" by the entity. *Id.*; see also, e.g., FEC Advisory Opinion 2010-08 (Citizens United). When both of these questions are answered affirmatively, the activity is held to serve a legitimate press function, and is fully covered by the statutory exemption.

Here, there is no question that both the January 14, 2010 broadcast of the Show and the information posted on the Show website were publicly available. The "materials" were disseminated widely to listeners within the KQTH coverage area who tuned in to the Show that day (and, indeed, to listeners in many other radio markets throughout the country), and the link posted on the Show website was more broadly available to anyone with a computer and an internet connection. See, e.g., FEC Advisory Opinion 2000-13 (iNEXTV) (concluding that a website was "viewable by the general public and akin to a periodical or news program distributed to the general public"). The Commission has expressly found that the media exemption extends to qualified activities that appear on the internet. See FEC Advisory Opinion 2005-16 (Fired Up!).

Moreover, the form of the segment and the hyperlink reference to the Brown campaign on the Show website were the same as countless other segments aired on the Show on a daily basis. As described above, the Show website's homepage always includes several links to recent topics addressed on the Show, and these links ordinarily remain active for only a few days before being replaced by links to more recently aired segments. See Affidavit of Mark R. Levin at ¶ 3. The older links then become part of the Show website's archived "Notes of Interest," and can only be accessed via a site search or by paging through the archived links. *Id.*

With specific reference to the Complaint's apparent objection to "asking listeners to donate" to the Scott Brown campaign, the Commission long ago made clear, and has reaffirmed on several occasions, that both endorsement of "and solicitation of contributions to [a] campaign in [a] commentary which appears as a regular feature" in a publication or other media outlet "would be covered by the news story exemption." FEC Advisory Opinion 1980-109 (The Ruff Times). In 2008, the Commission reaffirmed that nothing prohibits:

commentators and guests [from making] express treasury endorsements of certain candidates to viewers of its web site content and, concurrently, to suggest that viewers support such candidates with their contributions ... Accordingly, as

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with verbal solicitations, where it does not become a regular feature, the intermittent provision of a hyperlink directing a media Web site's visitors to a campaign's contribution page ... would not be prohibited.

FEC Advisory Opinion 2008-14 (Melethé, Inc.).

Finally, the Commission has noted that the exemption may not apply if a media outlet either becomes "a conduit or intermediary for a contribution made by an individual contributor" to a campaign (FEC Advisory Opinion 1989-109), or provides an affirmative mechanism to assist in raising funds such as "adding a contribution page [to a website] or providing a permanent hyperlink to" website addresses where viewers could make campaign contributions. FEC Advisory Opinion 2008-14 (Melethé, Inc.). But these potential issues are not present here. In this instance, the Show website homepage provided only a short-term informational link that directed interested listeners to a campaign website, and served neither to collect funds nor to provide a permanent link to a donation page. Indeed, campaign-related links on the Show website typically connect to the candidate home page or to a general intake page that offers the user multiple options, rather than to a dedicated contribution page. See Affidavit of Mark R. Levin at ¶ 4. The Show website itself does not collect donations on behalf of anyone, but merely links to sites for causes Mr. Levin supports. *Id.* Accordingly, the brief mention of campaign donations that occurred as part of Mr. Levin's January 14, 2010 commentary, including a reference to a temporary hyperlink on the Show's website homepage, was squarely within the scope of media activities previously found by the Commission to be covered by the statutory media exemption.

Conclusion

There is no question that KQTH's broadcast of "The Mark Levin Show" commentary on the Scott Brown campaign is an example of a radio station exercising the legitimate press function of providing topical news and comment, consistent with FECA's statutory media exemption. For this reason, the Act, the FEC's implementing regulations, and the well-established precedents applying these requirements compel dismissal of the Complaint without further action against any of the named parties.

Respectfully submitted,


David S. Keir
Sally A. Buckman
Nancy A. Ory

*Counsel to Citadel Broadcasting Corporation and
Journal Broadcast Corporation*

Attachments

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ATTACHMENT

**Transcript of Excerpt from January 14, 2010
Broadcast of "The Mark Levin Show"**

EXCERPT FROM JANUARY 14, 2010 BROADCAST OF "THE MARK LEVIN SHOW"

MARK LEVIN: Now to Massachusetts. The Leftists, the Marxists, the Socialists, Obama, the Democrat Party, they are throwing everything they have into this race - everything. They might win it and they might not, it is close. But it is fascinating, as I talked about several days ago, that they have to defend the bluest of blue states. They have to defend the seat that Ted Kennedy held. Are they not in some deep trouble or what? The Rothenberg Report, Stuart Rothenberg:

"Democratic desperation and other compelling evidence strongly suggest that Democrats may well lose the late Senator Edward Kennedy's Senate seat in Tuesday's special election. Because of this, we are moving our rating of the race from Narrow Advantage for the incumbent Party to Toss-Up. Whatever the shortcomings of the Coakley campaign (and they certainly exist), this race has become about Obama, President Obama and Democratic control of all of the levers of power in Washington, D.C. Brown has "won" the "free media" over the past few days, and if he continues to do so, he will win the election. Late Democratic efforts to demonize Republican Scott Brown, to make the race into a partisan battle and to use the Kennedy name to drive Democratic voters to the polls could still work. But the advertising clutter in the race works against them, and voters often tune out late messages, which can seem desperate."

And so they're using the same tricks from their hat. You know, demonize the Republican, bring up the Kennedys, do whatever you have to do, just stay away from the issues. I mean, that's pretty big, don't you think? I mean, it's stunning.

So, we still have Scott Brown's link on marklevinshow.com, isn't that correct Mr. Producer?

Let's go ahead and put that on the Facebook and Twitter site too, and encourage people to also consider giving a donation to that campaign since, even though Brown is raising a sizeable amount of money, he's being outspent two to one. Because, you know, the Democrats are the party of the little guy, they just collect little shekels from the poor people on the corner, who they represent, not the big insurance execs, not the big bank execs, No, just the little guys. And of

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STATEMENT OF DESIGNATION OF COUNSEL
Please use one form for each Respondent/Entity/Treasurer.
FAX (202) 218-5923

MUR # 6304

NAME OF COUNSEL: David S. Keir

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The above-named individual and/or firm is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

6/23/10
Date
Jacquelyn J. Orr
Respondent/Agent Signature

Jacquelyn J. Orr
General Counsel & VP
Title (Treasurer/Candidate/Owner)

NAMED RESPONDENT: Citadel Broadcasting Corporation

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Information is being sought as part of an investigation being conducted by the Federal Election Commission and the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) apply. This section prohibits making public any investigation conducted by the Federal Election Commission without the express written consent of the person under investigation

